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No. 90-1751

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

FELIX SANTONI ROIG, *ET AL.*,

Petitioners,

—v.—

IBERIA LINEAS AEREAS DE ESPANA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the dismissal of the appeal as to all plaintiffs, other than Felix Santoni Roig, was justified because (1) Mr. Santoni was the only plaintiff named in the notice of appeal and (2) the Secretary of Labor and Human Resources of Puerto Rico was not a party to the case because he failed to intervene in the action pursuant to Federal Rule of Civil Procedure 24?

2. Whether the Secretary of Labor and Human Resources of Puerto Rico, notwithstanding his failure to intervene pursuant to Federal Rule of Civil Procedure 24, became a party in this action, as opposed to an attorney representing some of the plaintiffs, when he filed a motion to assume legal representation of some of the plaintiffs after plaintiffs' previous counsel had withdrawn?

3. Whether the dismissal of the appeal by Felix Santoni Roig from the final judgment of the district court was proper because (1) he had filed a stipulation of settlement of his claims nearly four years earlier and (2) a subsequent motion to reinstate him as a plaintiff was denied by the district court and was not appealed?

LIST OF PARTIES

Iberia Lineas Aereas de Espana (Iberia Airlines of Spain) is owned by the National Institute of Industry Council, an entity of the government of Spain. Iberia Lineas Aereas de Espana owns 35% of Aerolineas Argentinas and 30% of Ladeco Airlines.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

COUNTERSTATEMENT OF THE CASE

This action was commenced by thirty former employees of Iberia Lineas Aereas de Espana ("Iberia") in Puerto Rico whose jobs had been eliminated in 1985 pursuant to an agreement between Iberia and the International Association of Machinists and Aerospace Workers, AFL-CIO, the plaintiffs' statutory bargaining representative under the Railway Labor Act. The agreement gave Iberia the right to contract out work at all airport locations in the United States and Puerto Rico and provided the employees with enhanced severance pay and other benefits in exchange for a general release of claims. Plaintiffs, without the participation or assistance of the Secretary of Labor and Human Resources of Puerto Rico (the "Secretary"), filed this case in the Superior Court of

Puerto Rico, claiming sums were due them under the laws of Puerto Rico for vacation and extra hours (overtime) over a 10 year period, and for dismissal without just cause. Iberia removed the action to the United States District Court for the District of Puerto Rico, pursuant to the removal provisions of the Foreign Sovereign Immunities Act, 28 U.S.C. § 1603(b) and 28 U.S.C. § 1441(d).

All plaintiffs were initially represented by Miguel A. Cabrera, Esq. and Alejandro L. Lorenzo, Esq. During the course of Iberia's efforts to obtain pretrial discovery, Mr. Lorenzo withdrew as plaintiffs' counsel. Shortly thereafter, Mr. Cabrera attempted to withdraw on the grounds that plaintiffs were unable to pay his fees. Although Mr. Lorenzo's withdrawal was approved, the district court granted Mr. Cabrera's motion *only* with respect to plaintiff Felix Santoni. (Mr. Santoni was ordered to appear through new counsel and, on June 12, 1986, Carlos T. Gonzalez Contraras, Esq. began representing Mr. Santoni.) The court's order further stated that "[a]ny remaining plaintiffs wishing to change counsel shall appear through new legal representation on or before June 16, 1986." Mr. Cabrera was directed to "continue representing the remaining plaintiffs until further Order of this Court." (Docket No. 52)[1]

In response to the district court's order, the Secretary filed a "Motion to Assume Legal Representation" requesting "permission to represent" all plaintiffs. (31a; 32a) Iberia opposed the motion on the grounds that "[s]ince the matter does not involve a class action, the Secretary . . . cannot assume the legal representation of plaintiffs in an ensuing lawsuit who have not individually requested same." (Docket No. 57) On June 25, 1986, the district court ruled that it was "not clear from the motion which of the plaintiffs the Secretary is authorized to represent" and ordered the Secretary to submit a "list of each individual plaintiff" he represented.

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1 References to "Docket No. ___" refer to the documents filed in the district court and recorded on the docket sheet. The petition is cited as "Pet. ___"; "___a" refers to the appendix to the petition.

(Docket No. 59) The list filed by the Secretary by motion on June 30 identified only fifteen plaintiffs that had authorized the Secretary to represent them. (34a) A report by the magistrate of a conference held on July 2, 1986, confirms that "the Secretary of Labor of the Commonwealth of Puerto Rico will represent those plaintiffs appearing in the motion of June 30, 1986. Thus, and pursuant to Judge Acosta's order, all other plaintiffs will continue to be represented by counsel Miguel A. Cabrera." (Docket No. 62)

Although the Secretary now contends that he became a party to the action and not merely an attorney representing the plaintiffs of record, nothing in the motion he filed suggests that he sought to act in such a capacity. To the contrary, the Secretary responded to the court's order by obtaining and filing consents from fifteen of the plaintiffs—not by asserting the statutory right to act on behalf of such persons without their consent. The Secretary did not file a complaint or a motion to intervene as a party as required by Fed. R. Civ. P. 24(c).

On August 28, 1986, the district court dismissed the complaint without prejudice based on plaintiffs' failure to respond adequately to interrogatories served by Iberia.[2] (Docket No. 75) Several months later, the court reconsidered and set aside that order. Iberia thereafter moved for summary judgment, which motion was denied by the court in an opinion dated June 20, 1988. (Docket No. 115) Iberia promptly filed a motion for reconsideration which, although not addressed at that time, was granted on August 3, 1990.

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2 In anticipation of the dismissal of their claims, some of the plaintiffs, including Mr. Santoni, accepted settlements and entered into stipulations for voluntary dismissal. (Docket No. 73) On January 25, 1989, the Secretary made a "Motion Based on Rule 21 of the Federal Rules of Civil Procedures" to add Mr. Santoni and three other individuals as plaintiffs on the grounds that the stipulations were not valid. Iberia opposed that motion, explaining in detail the reasons why each of the individuals was no longer a plaintiff. On May 16, 1990, the district court signed orders denying the Secretary's motion and granting Iberia's opposition. Those orders made clear that Mr. Santoni and the others were not plaintiffs in the action. (Docket Nos. 143 and 146)

Judgment was entered the same day dismissing the complaint for lack of jurisdiction, and remanding the claims to arbitration. (Docket No. 161)

The Secretary attempted to appeal from that judgment. On September 4, 1990, the Secretary filed the first notice of appeal. (1a) But, contrary to the Federal Rules of Appellate Procedure, the caption of that notice contained only the name of Felix Santoni Roig and used the phrase "et al." to designate the appellants. The body of the notice, moreover, stated only that "[n]otice is hereby given that the Secretary of Labor and Human Resources of Puerto Rico, in representation of plaintiffs, hereby appeals to the United States Court of Appeals for the First Circuit. . . ." Nowhere in the notice were the names of the parties taking the appeal individually listed, as required by Fed. R. App. P. 3(c).

Consequently, on September 27, 1990, the First Circuit, acting *sua sponte*, entered an order that unless the appellant filed a response demonstrating otherwise by October 12, "the notice of appeal will be deemed valid only as to Felix Santoni Roig". The order further stated that any new notice of appeal listing all the plaintiffs or motion to extend the time for filing a new notice of appeal should be promptly filed with the district court. (3a)

The Secretary ignored the court's order and failed to move to extend the time for filing a notice of appeal by October 4, the last date by which such motion could be made under Fed. R. App. P. 4(a)(5). Rather, on October 10, one week *after* the time to request an extension elapsed, the Secretary filed a "New Notice of Appeal." (5a) The "New Notice" listed all 30 plaintiffs in the caption, although the Secretary never represented many of them, and others (including Santoni) had admittedly settled their claims and were no longer plaintiffs. The "New Notice"—like the original—did not list the Secretary as a plaintiff or an intervenor, in its caption or anywhere else.

Iberia moved to dismiss the second appeal on the grounds that it was untimely. It also moved to dimiss the first appeal

on the grounds that it was valid on its face only as to Mr. Santoni, but, since Mr. Santoni was not a party, he had no standing to appeal from the district court's August 3 judgment. On November 2, 1990, the First Circuit issued an order directing "appellant . . . to either move for voluntary dismissal under Rule 42(b) F.R.A.P. or to show cause why this appeal should not be dismissed." (8a) It was only after this order that the Secretary claimed in the court of appeals that the first notice of appeal was sufficient because he was a party to the action.

On December 20, 1990, the court of appeals dismissed the appeals "for lack of jurisdiction", except as to Mr. Santoni, "the one plaintiff named in the only timely notice of appeal." (13a-14a) It found that the Secretary could not come before the court as a party on appeal since he had not intervened as a party but had "merely assumed legal representation of the plaintiffs' case." (13a) Finally, the court dismissed the appeal of Mr. Santoni on the grounds that the notice of appeal purported to appeal only from the August 3, 1990 judgment dismissing the complaint, and Mr. Santoni was no longer a party at that time.

Petitioners request a writ of certiorari to review the order dismissing the appeals.[3]

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3 Although petitioners discuss the district court's award of summary judgment (Pet. 10-12) and suggest that that decision raises important issues that "may be clarified, eventually, by this Honorable Court, in this case" (Pet. 14), the merits of the district court's decision are not before this Court. Accordingly, Iberia does not respond to the claimed "important issues" that were not presented to the Court of Appeals.

REASONS FOR DENYING THE PETITION

1. The Decision Below Is Consistent with the Decisions of this Court and Does Not Raise an Important Issue of Federal Law.

The decision of the court of appeals to dismiss the appeals involves the simple application of well-settled procedural rules, consistent with decisions of this Court as well as other circuit courts, and does not merit review by this Court.

A. The Court of Appeals had no jurisdiction over the attempted appeal by plaintiffs other than Mr. Santoni.

Rule 3 of the Federal Rules of Appellate Procedure provides that a "notice of appeal shall specify the party or parties taking the appeal . . . ." As this Court made plain in *Torres* v. *Oakland Scavenger Co.*, 487 U.S. 312 (1988), Rule 3 creates "jurisdictional requirements" that "may not [be] waive[d] . . . even for 'good cause shown' " 487 U.S. at 317. Thus, the "failure to name a party in a notice of appeal . . . constitutes a failure of that party to appeal." 487 U.S. at 314. The caption of petitioners' only timely notice of appeal did not identify any plaintiff other than Felix Santoni Roig.[4] Although the caption referred to "Felix Santoni Roig, Et Al.", the phrase "et al." is wholly insufficient to specify

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4 Rule 4(a) of the Federal Rules of Appellate Procedure requires that a notice of appeal "be filed with the clerk of the district court within 30 days after the date of entry of the judgment or order appealed from. . . ." "This 30-day time limit is 'mandatory and jurisdictional.' " *Browder* v. *Department of Corrections*, 434 U.S. 257, 264 (1978) (*quoting*, *United States* v. *Robinson*, 361 U.S. 220, 229 (1960)). Appellate courts are "forbid[den] . . . to 'enlarge' the time limits for filing a notice of appeal, which are prescribed in Rule 4." *Torres* v. *Oakland Scavenger Co.*, 487 U.S. 312, 315 (1988). An untimely appeal must be dismissed for lack of jurisdiction. *See, e.g.*, *Washington* v. *Bumgarner*, 882 F.2d 899, 900 (4th Cir. 1989), *cert. denied*, 110 S. Ct. 874 (1990). Although petitioners argued below that the "New" notice of appeal should be considered an amendment to the first notice and, therefore, as being timely, the First Circuit implicitly rejected that claim and petitioners do not challenge that decision before this Court.

the party or parties taking the appeal, particularly where, as here, the named plaintiff is not a class representative. 487 U.S. at 318 ("The purpose of the specificity requirement of Rule 3(c) is to provide notice both to the opposition and to the court of the identity of the appellant or appellants. The use of the phrase 'et. al.,' which literally means 'and others,' utterly fails to provide such notice to either intended recipient."). The courts of appeals have strictly applied *Torres* and dismissed appeals of plaintiffs not expressly named in the notice of appeal. *See, e.g., Laidley* v. *McClain*, 914 F.2d 1386, 1388 (10th Cir. 1990); *Birdsong* v. *Wrotenberg*, 901 F.2d 1270, 1273 (5th Cir. 1990); *Cruz* v. *Melendez*, 902 F.2d 232, 235 (3d Cir. 1990); *Minority Employees* v. *Tennessee Dep't of Employment Security*, 901 F.2d 1327 (6th Cir.), *cert. denied*, 111 S. Ct. 210 (1990); *Shatah* v. *Shearson/American Express Inc.*, 873 F.2d 550 (2d Cir. 1989); *Akins* v. *Board of Governors*, 867 F.2d 972 (7th Cir. 1988).

Petitioners assert that the notice of appeal was sufficient to designate the "Secretary of Labor and Human Resources of Puerto Rico, *representing the public interest of Puerto Rico*" as an appellant. (Pet. 14; emphasis added) The notice, however, contained no such designation. To the contrary, the notice expressly stated that the "Secretary of Labor and Human Resources of Puerto Rico, *in representation of plaintiffs*, hereby appeals . . . ." (1a; emphasis added) Thus, the notice conveys the meaning that the Secretary was acting only in a representative capacity and does not constitute an appeal by the Secretary as a party.[5] But even if the notice of appeal could be interpreted as petitioners suggest, dismissal of the

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5 The Second notice of appeal confirms this. The caption of that notice lists all the individual former employees of Iberia as plaintiffs and does not include the Secretary of Labor and Human Resources as a plaintiff. (5a) The body of that notice, moreover, states that "the Secretary of Labor and Human Resources of Puerto Rico, in representation of plaintiffs, hereby appeals . . . ." (6a) If the Secretary intended to appeal in his official capacity, he could have done so simply by stating that the "Secretary of Labor and Human Resources of Puerto Rico, *in his own behalf* and in representation of plaintiffs, hereby appeals."

appeal was proper because the Secretary was not a party to the judgment and, under longstanding authority of this Court, "[o]ne who is not a party to a record and judgment is not entitled to appeal therefrom." *Matter of Leaf Tobacco Bd. of Trade*, 222 U.S. 578, 581 (1911); *accord*, *Marino* v. *Ortiz*, 484 U.S. 301, 304 (1988) ("The rule that only parties to a lawsuit, or those that properly become parties, may appeal is well settled.")

B. The Court of Appeals lacked jurisdiction over the appeal by petitioner Santoni because he was not a party to the judgment appealed from.

The court of appeals correctly held that petitioner Felix Santoni lacked standing to appeal from the district court's August 3, 1990 judgment. Mr. Santoni was not a party of record on August 3, 1990. Nearly four years earlier, in response to a report and recommendation by the Magistrate that Iberia's motion to dismiss the complaint for failure to respond to interrogatories should be granted, Mr. Santoni (together with a number of other plaintiffs) accepted a settlement offer by Iberia and executed a stipulation for voluntary dismissal of his claims. Thereafter, he ceased to be a party to this case although his name remained in the caption because he had been the first-named plaintiff when the action was originally filed. Indeed, on January 25, 1989, the Secretary made a "Motion based on Rule 21 of the Federal Rules of Civil Procedure" to reinstate as plaintiffs Mr. Santoni and three other original plaintiffs who had stipulated to the dismissal of their claims. That motion was denied by the district court on May 16, 1990 (Docket No. 146), making it clear that Mr. Santoni was no longer a party. As discussed above, "[o]ne who is not a party to a record and judgment is not entitled to appeal therefrom." *Matter of Leaf Tobacco Bd. of Trade*, 222 U.S. at 581.

Although the petition raises as a question presented whether the district court and the court of appeals "ilegally [sic] validated the stipulations, waivers and releases, signed by employees (petitioners) and not approved by the Secre-

tary," (Pet. I-II), the facts do not permit formulation, much less require resolution, of that question. First, the "Admitted Facts" section of the Joint Pre-Trial Order, *signed by the Secretary as "Plaintiffs' Attorney"* and submitted to the district court on July 24, 1990, lists the fifteen plaintiffs represented by the Secretary who "still have live claims herein". (Docket No. 156) That list does not include petitioner Santoni. Paragraph 10 of that section, moreover, expressly states that the stipulation of dismissal by Mr. Santoni "constitutes a full and final settlement of all claims alleged in, related to, or arising out of this case."

In any event, no timely appeal was taken from the district court's refusal to reinstate Mr. Santoni as a party, and therefore, the question is not properly before this Court. Fed. R. App. P. 3(c) expressly requires that the notice of appeal "shall designate the judgment, order or part thereof appealed from." As the court of appeals found, the notice filed by the Secretary contains no "indication of any intent to appeal from the denial of the motion to reinstate Mr. Santoni." (14a)[6] Rather, the notice informed Iberia only of the appeal "from the district court's August 3, 1990 judgment remanding this case to arbitration." (14a) The failure to indicate the intention to appeal from the refusal to reinstate Mr. Santoni as a plaintiff deprived the court of appeals of jurisdiction over that claim. *See, e.g., Casella* v. *Webb*, 883 F.2d 805, 807 n.2 (9th Cir. 1989); *Brandt* v. *Schal Associates, Inc.*, 854 F.2d 948 (7th Cir. 1988); *Brookens* v. *White*, 795 F.2d 178 (D.C. Cir. 1986); *Pitney Bowes, Inc.* v. *Mestre*, 701 F.2d 1365 (11th Cir.), *cert. denied*, 464 U.S. 893 (1983); *Elfman*

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6 Not only was the August 3 judgment identified by date in the notice of appeal, but the notice contained an additional paragraph stating the plaintiff's position that the court had "erroneously remanded the case to be Arbitrated under a collective bargaining agreement and the Railway Labor Act, when the Court had to apply the local statutes of Puerto Rico pertinent to the issues in the case." (1a-2a) No mention was made in the notice of the May 16, 1990 order denying the motion to add Santoni as a plaintiff. The scope of the notice was confirmed by the Statement of Issues, which was similarly limited to the August 3 judgment.

Motors, Inc. v. *Chrysler Corp.*, 567 F.2d 1252 (3d Cir. 1977); *Cole* v. *Tuttle*, 540 F.2d 206 (5th Cir. 1976).

2. The Conclusion that the Secretary Did Not Intervene As a Party in the Action Does Not Raise an Important Question of Federal Law.

There is no issue presented here as to whether the Secretary was deprived of the substantive right under the laws of Puerto Rico to intervene as a party to this action. The court below held only that "the Secretary neglected to [intervene] in this case." (13a) That holding was clearly permissible under governing federal law.

Fed. R. Civ. P. 24(c) requires that a "person desiring to intervene shall serve a motion to intervene upon the parties as provided in Rule 5. The motion shall state the grounds therefor and shall be accompanied by a pleading setting forth the claim or defense for which intervention is sought." The Secretary took no action whatever to comply with the Federal Rules of Civil Procedure for obtaining status as a party in this action. No motion to intervene was ever served. No pleading setting forth the claim for which intervention was sought was ever filed. Instead, the Secretary became involved in this action by filing a "Motion to Assume Legal Representation" (31a) immediately after the district court had ordered that "plaintiffs wishing to change counsel shall appear through new legal representation on or before June 16, 1986." (Docket No. 52) On this basis alone, the determination that the Secretary did not intervene and, therefore, could not appeal, was appropriate. *See, e.g.*, *Warner Bros., Inc.* v. *Dae Rim Trading, Inc.*, 877 F.2d 1120, 1127 (2d Cir. 1989) ("Absent permitted intervention, Attorney . . . who was not a party to the action below and who was not aggrieved by the district court's judgment, had no right at all to appeal."); *Shevlin* v. *Schewe*, 809 F.2d 447 (7th Cir. 1987) (intervenor failed to file any pleading on a timely basis); *Spangler* v. *Pasadena City Bd. of Educ.*, 552 F.2d 1326, 1329 (9th Cir. 1977)

(error for court to conduct proceedings at the request of individuals who have not filed motion to intervene).[7]

The decision in *Bender* v. *Williamsport Area School Dist.*, 475 U.S. 534 (1986), is instructive. In that case, the appellant had participated in the district court action as a member of a school board, but when the school board refused to appeal an adverse decision, appellant attempted to prosecute an appeal in his individual capacity as a parent. In holding that the Court of Appeals was without jurisdiction to hear the appeal, the Court noted:

> Because his status as a parent was obviously different from his official status as a member of the Board, in order to participate as a parent in the District Court litigation it was incumbent upon [appellant] under Rule 24 of the Federal Rules of Civil Procedure to make "timely application" by an appropriate motion "stat[ing] the grounds" for intervention and "setting forth the claim or defense for which intervention is sought." No such pleading was filed in either of the courts below.

Id. at 548 n.9 (citation omitted). Here the Secretary participated in the action before the district court as an attorney representing some of the plaintiffs and initially attempted to file an appeal on that basis. Only when it became clear that the attempted appeal was deficient, did the Secretary claim that he was entitled to appeal in his own right as a party "representing the public interests of Puerto Rico." (Pet. 14) In order to participate in that capacity, however, it was incumbent upon the Secretary to intervene as a party.[8] He never did.

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7 The fact that the Iberia did not object when the Secretary, in September 1986, answered interrogatories on behalf of the plaintiffs does not establish that the Secretary was regarded as a party despite the failure to intervene. To the contrary, the interrogatory answers were not signed by the Secretary as a plaintiff but, rather, were expressly signed, "in representation of Eduardo Bidot, Plaintiff." (25a)

8 The public interest represented by the Secretary and the private interests of employees are not always consistent. *See, e.g., Cosme*

Petitioners contend that the Secretary "intervened in the case pursuant to the local statutes of the Commonwealth of Puerto Rico" (Pet. 1) and that by failing to treat his motion for representation as the equivalent of a motion for intervention, the Court of Appeals "ignored" the local statutes of Puerto Rico, the " 'law of the land.' " (Pet. 13) The simple answer to that contention is that the procedural rules of Puerto Rico do not apply in an action in federal court. In *Hanna* v. *Plummer*, 380 U.S. 460 (1965), an action based on diversity, it was held that federal rather than state procedural law regarding service of process applied even though the application of federal procedure "changed" the outcome of the case in a manner inconsistent with state law.[9] The Court reasoned that "[t]o hold that a Federal Rule of Civil Procedure must cease to function whenever it alters the mode of enforcing state-created rights would be to disembowel either the Constitution's grant of power over federal procedure or Congress' attempt to exercise that power in the Enabling Act." *Id.* at 473-74 (footnote omitted). Like the procedure for service of process at issue in *Hanna* v. *Plummer*, the mechanics of intervention is a matter of procedure which, in an action pending in federal court, is governed by federal law, not state law. *See, e.g., Venegas* v. *Skaggs*, 867 F.2d 527, 530 n.2 (9th Cir. 1989), *aff'd on other grounds*, 110 S. Ct. 1679 (1990); *Olden* v. *Hagerstown Cash Register, Inc.*, 619 F.2d 271, 273-74 (3d Cir. 1980); *McDonald* v. *E.J. Lavino, Co.*, 430 F.2d 1065, 1070 (5th Cir. 1970).[10] Accord-

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Nieves v. *Deshler*, 786 F.2d 445, 452-53 (1st Cir.), *cert. denied*, 479 U.S. 824 (1986) (Secretary supported defendant's claim that Puerto Rico wage laws did not apply to plaintiffs).

9 Service of process had been effected by leaving the summons and complaint with the defendant's wife at his residence, a method permitted by federal law but not state law. 380 U.S. at 461.

10 The fact that this action was initially commenced in state court and removed to federal court by defendant is irrelevant. "The Federal Rules of Civil Procedure, like other provisions of federal law, govern

ingly, with respect to intervention, the "law of the land" is federal law, and even if the Court of Appeals could be said to have "ignored the local statutes of Puerto Rico" regarding intervention, it was required to do so by long standing federal precedent.[11]

The decision in *Hanna* v. *Plummer* also addresses petitioners' claim that if the decision below is allowed to stand, "tremendous damage will be inflicted to the rights of employees in Puerto Rico . . . [because] [e]very employer who can remove a case, will be seeking the most convenient forum without any respect to comply with local statutes in Puerto Rico." (Pet. 16) Here, as in *Hanna* v. *Plummer*, the difference between the state practice (as described by petitioners) and the federal rules is "of scant, if any, relevance to the choice of forum." 380 U.S. at 469. In removing the case to federal court, Iberia was not presented with a situation where application of federal law would have *precluded* intervention by the Secretary; rather, adherence to the federal rule at most merely altered the way in which intervention was to be accomplished. It cannot be argued that altering the mode of intervention affects the substantive rights created by the laws of Puerto Rico.[12]

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the mode of proceedings in federal court after removal." *Granny Goose Foods, Inc.* v. *Brotherhood of Teamsters & Auto Truck Drivers, Local No. 70*, 415 U.S. 423, 438 (1974).

11 Petitioners claim that the "reason why the Secretary of Labor and Human Resources does not appear in the caption of the case, as intervenor, is because such amendment was never taken care of by the United States District Court for the District of Puerto Rico." (Pet. 13) Petitioners do not identify the "amendment" to which they refer because there was none. While petitioners assert that they "have not changed the caption because [they] have to be faithful to the manner in which it still appears in the lower courts", (Pet. 13) the fact is that the Secretary is not identified as an intervenor or a plaintiff in the body of the notice of appeal or in the pretrial order prepared and signed by him as "Plaintiffs' Attorney".

12 The asserted "conflict" between federal and state law is, moreover, not readily apparent. The Puerto Rico rule governing intervention

3. Since the First Circuit Did Not Assign a Role to the Secretary that Is Prohibited by the Statutes of Puerto Rico, No Compelling Reason Exists for Granting the Writ.

As has been made evident herein, the First Circuit did not, as petitioners' claim, *add* the role of legal representative or counsel to the Secretary. (Pet. 16) The Secretary assumed that role when he filed a motion to represent some of the plaintiffs in this case in response to the district court's order regarding change of counsel. Nothing in the statutes of Puerto Rico cited by petitioners expressly prohibits the Secretary from acting as a lawyer in an action previously commenced by the employees without the assistance or participation of the Secretary. Accordingly, the interpretation by the First Circuit is not "seriously inconsistent with the 'law of the land. . . .' " (Pet. 16)

The cases discussed at pages 17-20 of the petition are entirely inapposite. Unlike the instant case, they involve situations where the government agency, *acting as a plaintiff*, commenced the action in its own name and thus was a party rather than a lawyer representing the plaintiffs. For example, in *Sierra, Secretary of Labor* v. *Superior Court*, 81 P.R.R. 540 (1959), the court relied on the "essential fact" that the

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(Rule of Civil Procedure of 21.4, P.R. Laws Ann. tit. 32, App. III R 21.4 (1983)), is virtually identical to the Fed. R. Civ. P. 24(c): "A person desiring to intervene shall serve a motion to intervene upon the parties as provided in Rule 67. The motion shall state the grounds therefor and shall be accompanied by a pleading setting forth the claim or defense for which intervention is sought." These rules govern "[i]n all cases prosecuted under sections 3118-3132 of this title," the summary procedure under which the complaint herein was apparently filed, "insofar as they are not in conflict with the specific provisions of these sections or with the summary nature of the procedure hereby established". P.R. Laws Ann. tit. 32, § 3120 (1990).

Although petitioners initially assert that "[i]t is *always* interpreted in Puerto Rico that [a motion for] representation is an 'intervention' " (Pet. 13), petitioners subsequently limit that claim to what is "normally understood in the local courts, under local statutes." (Pet. 13) In neither instance do petitioners offer any statutory or case law support for that assertion.

Secretary of Labor actually initiated the proceedings and "appeared in court as plaintiff in this litigation 'in representation and for the benefit' of the 16 workmen mentioned in the complaint." *Id.* at 552. Similarly, the federal cases of *Mitchell, Secretary of Labor* v. *Tampa Cigar Co.*, 36 Lab. Cas. (CCH) ¶ 65,198 (S.D. Fla. 1959), *Mitchell, Secretary of Labor* v. *Floyd Pappin & Son, Inc.*, 122 F. Supp. 755 (D. Mont. 1954), and *Tobin, Secretary of Labor* v. *Carl F. Wilson*, 19 Lab. Cas. (CCH) ¶ 66,307 (N.D. Ill. 1951), each involved actions where the government agency commenced the action.

As the statutes quoted by petitioners state (Pet. 4-8), under the laws of Puerto Rico, both the Secretary and the individual employees could have commenced an action against Iberia.[13] Had the Secretary done so, he would have been a party to this action, listed in the caption and body of the complaint. Only the employees commenced an action, however. The Secretary had authority to intervene in the employees' action, if he chose to do so. But, in federal court (and, most likely, in state court) he was required to file a motion to intervene and a pleading setting forth the claim for which intervention was sought, which he did not do.

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13 Petitioners' claim that "in cases involving labor matters, under local statutes, . . . the only adverse party is the Secretary . . ." (Pet. 17), is flatly contradicted by the local statutes cited by petitioners.

Conclusion

There is no compelling issue of federal law here and no conflict between the First Circuit and any other court. This is simply a case where the Secretary neglected to comply with unambiguous procedural rules applicable in the federal courts. The petition for a writ of certiorari should be denied.

Respectfully submitted,

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